

UNITED STATES COURT OF APPEALS

OCT 21 2003

TENTH CIRCUIT

PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICKY JOE NELSON,

Defendant-Appellant.

No. 02-6183

(D.C. No. CR-01-142-R)

(W.D. Oklahoma)

ORDER

Before **EBEL**, **HENRY**, and **HARTZ**, Circuit Judges.

This matter comes before the court on the Petition for Rehearing of Defendant Ricky Joe Nelson and the response of his attorney, Thomas D. McCormick, to our order to show cause.

On further review of the record, in light of Mr. McCormick's response, we discharge the order to show cause.

In addition, we grant the Petition for Rehearing. Of critical importance in this appeal is whether Defendant properly preserved below his contention that the word "and" should be substituted for the word "or" at several places in two instructions that contained the phrase "outside the usual course of medical practice *or* without legitimate purpose." (emphasis added). Unfortunately, we are

unable to determine with confidence whether the contention was preserved. The matter is addressed on pages 405-07 of the trial transcript, but it is unclear which instruction (or instructions) is being referred to and what the district court ruled.

We therefore withdraw our order and judgment filed on August 19, 2003, and remand this cause to the district court to clarify the matter of preservation by answering the following two questions: (1) To what instructions (and to what occurrences in the instructions) did Defendant raise an objection regarding the use of “or” rather than “and”? (2) How did the district court rule on the objection? The district court may, in its discretion, conduct an evidentiary hearing. Also, the parties, of course, may stipulate to the answers.

The district court shall report its answers to this court within 30 days of the date of this order. We retain jurisdiction over this appeal pending the supplementation of the record by the district court.

ENTERED FOR THE COURT

Harris L Hartz
Circuit Judge